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Supreme Court of the United States

OCTOBER TERM, 1950

No. 369

O. G. CARROLL and ANGELA J. CARROLL, husband and wife,

Petitioners.

vs.

LAURETTA KELLY, as administratrix of the estate of Morris C. Kelly, deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The opinion of the Supreme Court of the State of Washington (R. 14-31) is reported in 136 Wash. Dec. 445, 219 P. (2d) 79, and the decision and order denying petitioners' Petition for Re-Hearing (R. 32-77) is reported in 136 Wash. Dec. 791.

JURISDICTION

The judgment and decision of the Supreme Court of the State of Washington (R. 14-31) was rendered and filed May 31st, 1950, and within the time prescribed by RULE 22 of the Rules of the Supreme Court of Washington, (Appendix to Petition ....-....) petitioners served and filed their Petition for Re-Hearing (R. 32-78), which under the rule suspended the decision until the decision on the Petition for Re-Hearing. On July 19th, 1950, the Supreme Court of Washington rendered and filed its Order Denying Petition for Re-Hearing (R. 79). October 16th, 1950, within ninety days after the final determination of said Supreme Court of Washington, petitioners filed their Petition for Writ of Certiorari and the record in said cause in this court.

Petitioners contend that this court has jurisdiction to issue the writ prayed for under the provisions of 28 U.S.C. 1257(3) in that by the decision of the Supreme Court of Washington (R. 14-31) and the rendering and entering of its Order Denying Petition for Re-Hearing (R. 79) the petitioners have been denied rights guaranteed them under Amendment XIV of the Constitution of the United States, in that:

1. The decision deprives petitioners of their right

of property and liberty in the pursuit of their profession without due process of law.

2. It abridges the privileges of petitioners and is discriminatory.

3. It denies to petitioners the equal protection of the law.

The federal question involved had its inception and was created by the wholly unanticipated and unexpected decision of the Supreme Court of Washington filed May 31, 1950 (R. 14-31) overruling long established rules and principles governing practice and procedure applicable to trials in malpractice cases, as applied to drugless physicians and sanipractors and their patients. It was presented to the Supreme Court of Washington by the Appellants' Petition for Re-Hearing (R. 32-77) and decided adversely to petitioners by the order of said supreme court denying said petition (R. 79).

The rules and principles governing practice and procedure applicable to trials in malpractice cases as applied to drugless physicians and sanipractors and their patients were laid down by the Supreme Court of Washington in the case of *Brooks v. Herd,* 144 Wash. 173, 257 Pac. 238, holding in part:

"The principles of law governing the relations

> of regular physicians and surgeons and their patients govern as to drugless healers and their patients."

In the later case of *Fritz v. Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, the Supreme Court of Washington laid down definite and certain rules and principles governing the relations of regular physicians and surgeons and their patients. By its decision in this case, in which petitioners were appellants and the respondent herein was respondent, (R. 14-31) the Washington Supreme Court diametrically reversed the rules and principles governing the relations of drugless physicians and sanipractors and their patients, under which the case had been tried, and established new and different rules and principles governing the practice and procedure in such cases, and by denial of petitioners' Petition for Re-Hearing deprived petitioners of the rights guaranteed them under Amendment XIV of the Federal Constitution of a fair and impartial trial, and of due process and equal protection of the law.

This court has on numerous occasions declared that "in determining what justice does require, the court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

Ashcraft v. Tennessee, 322 U. S. 143; 88 L. Ed. 1192; 64 S. Ct. 921; citing:

Patterson v. Alabama, 294 U. S. 600, 79 L. Ed. 1082, 55 S. Ct. 575;

State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605.

See, also:

Huddleson v. Dwyer, 322 U. S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015.

The Supreme Court of Washington is the court of last resort and its decision is final. The court is comprised of two departments which alternate in hearing appellate cases, and unless a hearing *en banc* is granted, the departmental decision becomes final. In the case under consideration the Petition for Re-Hearing was denied and the departmental decision became final and was made and entered in Department II, consisting of Chief Justice Simpson and Associate Justices Mallery, (who wrote the opinion) Robinson, Hill, and Hamley.

QUESTIONS PRESENTED

I. Have petitioners been deprived of their constitutional guarantee of a fair and impartial trial where on appeal the state supreme court of last resort disregards established rules of evidence and principles

governing trials of malpractice cases brought against drugless healers and sanipractic physicians and refuses to consider evidence of experts presented under rules and principles as they existed prior to the opinion and decision of the supreme court, without affording petitioners the benefit of a new trial in accordance with the radically changed rules of evidence and principles laid down in such opinions and decision?

II. Have petitioners been deprived of their property rights and right of liberty in the pursuit of their profession, guaranteed under Amendment XIV of the Federal constitution in a malpractice case against a drugless and sanipractice physician in which the state supreme court of last resort discriminated against and denied equal protection of the law by its opinion and decision overruling established rules and principles governing the relation of drugless and sanipractic physicians and their patients, under which established rules and principles the case was tried in the trial court, without affording petitioners an opportunity to defend under the rules and principles established by the opinion and decisions?

III. Have petitioners been denied due process and equal protection of the law guaranteed by Amendment XIV of the Federal constitution, where in a mal-

practice action against a drugless and sanipractic physician has been discriminated against by a radical change in the rules and principles of practice and procedure in such cases, holding the prior established rules and principles are not applicable to drugless and sanipractic physicians, although they are applicable to medical physicians and surgeons, notwithstanding the fact that both are licensed to practice under the statutes of the state, and petitioners have complied with all statutory requirements?

IV. In a malpractice action against a drugless physician, has a state, by an opinion and decision of the court of last resort of that state, abridged petitioner's privilege and immunities and right of liberty in the practice of his profession by discriminating against petitioners in an opinion and decision which holds that petitioner may not use the title "Doctor," although he has complied with all of the statutory requirements in the practice of his profession?

STATEMENT

The respondent herein by her amended complaint (R. 1-16) brought action to recover $51,000.00 in damages for the alleged wrongful death of her husband. She alleged as acts of negligence on the part of the

petitioners a wrongful diagnosis followed by wrongful treatment. The petitioner O. G. Carroll is a licensed drugless and naturopathic physician and the petitioner Angela J. Carroll, his wife, was alleged under the amended complaint to have acted as his nurse and assistant in the treatment of respondent's husband. By their answer (R. 6-9) the petitioners categorically denied the allegations of wrongful diagnosis and wrongful treatment of the patient, and as an affirmative defense pleaded contributory negligence on the part of the patient and the respondent herein which proximately caused the death, which contributory negligence was denied by reply thereto (R. 12).

On the issues so joined the case was tried to the court sitting with a jury and resulted in a verdict and judgment in favor of the respondent against the petitioners for $15,837.35 and costs (R. 13). An appeal was taken by petitioners herein to the Supreme Court of Washington, and under date of May 31, 1950, the supreme court rendered its opinion and decision (R. 14-31) affirming the judgment.

On the trial of the action the trial court in its rulings and instructions, and the attorneys representing both petitioners and respondent herein observed and followed the rules and principles laid down in

the cases of *Brooks v. Herd,* 144, Wash. 173, 257 Pac. 238, and *Fritz v. Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, hereinafter discussed in the Argument, and by its opinion and decision (R. 32-77) the Supreme Court of Washington promulgated rules and principles diametrically opposed to the rules and principles under which the case had been tried, which had theretofore been the law of the state.

The violation of petitioners' right of a fair and impartial trial under the State and Federal Constitutions, and the violation by the decision of the guaranteed right of due process of law and equal protection of the law were presented to the supreme court by the Petition for Re-Hearing. The supreme court, however, refused to consider the petition, refused to grant a re-hearing *en banc*, and entered its order denying the petition (R. 79).

SUMMARY OF ARGUMENT

Where on appeal from the trial court's judgment in an action to recover damages for the alleged wrongful death of a patient under the care of a drugless healer, the State Supreme Court established rules and principles of law diametrically contrary to existing rules and principles governing such cases, and when on Petition for Re-Hearing (R. 32-77) such material

departure from the established rules and practices are called to the attention of the appellate court, and the claim is made that the petitioners have thereby been deprived of rights guaranteed them by the Fourteenth Amendment of the Federal constitution, and the court refuses to grant such re-hearing or give petitioners an opportunity to present their defense in the light of such new rules and principles established by such decision, is there a Federal question presented for which this court can give relief by way of certiorari?

ARGUMENT

As appears from the foregoing Statement, this is an action brought against a drugless and sanipractic physician to recover damages for the alleged negligent and wrongful diagnosis and treatment of a patient claimed to have resulted in the death of the patient. Trial of the case to the court sitting with a jury resulted in a verdict and judgment against petitioners herein, in the amount of $15,837.35 and costs, from which judgment and orders denying petitioners' motions for judgment *non-obstante veredicto* or in the alternative for a new trial an appeal was taken to the Washington Supreme Court.

At the time of the trial of the case in the lower court, the rules and principles governing cases of this nature had been promulgated and established by the Supreme Court of Washington in the cases of *Brooks v. Herd,* 144 Wash. 173, 257 Pac. 238, decided June 22nd, 1927, which declared:

> "In general, the court submitted the case to the jury upon perfectly proper instructions as to the law governing the relations of *physicians* and patients. Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidded to invade the field of practice of any other school of drugless healing or of any regular school of healing. *Otherwise, the principles of law governing the relations of regular physicians and surgeons and their patients govern as to drugless healers and their patients. Wilcox v. Carroll,* 127 Wash. 1, 219 Pac. 34. The court in general gave the same instructions in this case as should be given in an ordinary malpractice case by a patient against a practitioner of a regular school of healing, for negligent care and treatment."

and *Fritz v. Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, decided November 1st, 1945, wherein the Wash. ington Supreme Court cited and reviewed its holdings in a vast number of cases previously decided and said:

"Before referring to the facts, however, it seems advisable to set out certain general rules of law governing actions for malpractice which are almost universally accepted by the courts and which are applicable to the present situation. We set them out as follows: (1) An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average member of the profession in the community in which he practices, and that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment. (2) The contract which the law implies from the employment of a physician or surgeon is that the doctor will treat his patient with that diligence and skill just mentioned (citing cases). (3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession (citing cases). (4) Before a physician or surgeon can be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by those standards. 48 C.J. 112. (5) In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and further, that

the doctor failed to follow the methods prescribed by that standard. (6) It is not required that physicians and surgeons guarantee results, nor that the result will be what is desired (citing cases). (7) *The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury must not be allowed to accept one theory to the exclusion of the other* (citing cases). (8) Negligence on the part of the physician or surgeon by reason of his departure from the popular standard of practice must be established by medical testimony (citing cases). The reason is that juries must be informed as to the facts or criterion upon and by which the standard of ordinary skill and ordinary care and diligence rests and is regulated by the medical profession. To supply the need, evidence may properly be introduced to show such facts. This evidence, from the very nature of the case, must come from men learned in the profession *because other witnesses are not competent to give it. Jurors and courts are not in any way conversant with what is entirely peculiar to the practice of medicine and*

> *surgery. They may not arbitrarily determine the proper methods of treating an ailment—that is a medical question. Ewing v. Goode,* 73 Fed. 442."

This case was tried strictly in accordance with the foregoing rules established by the Supreme Court of Washington in the cases above cited and quoted from. This fact is apparent from the opinion and decision (R. 14-31) of the Washington Supreme Court in this case, wherein it is said:

> "Pursuant to his theory, the appellant produced witnesses who were drugless healers, who supported his version of the facts as to the diagnosis and treatment of the deceased. It is appellant's position that a doctor of a particular school may practice according to the tenets of that school, and that the testimony of doctors of a different school, who disagree with such treatment, cannot establish negligence. In short, that a drugless healer must be tried upon the expert opinion of drugless healers only, and that they will not be liable if they follow the tenets of their school."

Nothwithstanding the fact that the rules and principles governing the relations of regular physicians and surgeons and their patients were declared in the case of *Brooks v. Herd, supra,* to govern as to drug-

less healers and their patients, and that in the case of *Fritz v. Horsfall, supra,* the rules and principles governing the relations of regular physicians and surgeons and their patients were laid down, in the opinion and decision (R. 14-31) of the case at bar the Washington Supreme Court radically departed from such established rules and principles and purported to establish diametrically opposite rules and principles governing the relations of drugless healers and their patients, as is apparent from the reading of the opinion and decision.

At the outset the writer of the opinion challenges petitioner's right to be referred to as a doctor and infers that because he was referred to as a doctor in the trial, in the briefs, and the argument he was practicing medicine, which he was not permitted to do under his license. The title "doctor" in its ordinary use, however, may refer to any person learned in some of the arts, skills, or professions, a scholar or teacher, and the title is not limited to those in the practice of medicine. There are doctors of law (LLD), doctors of divinity (DD), doctors of dental surgery (DDS), and doctors of philosophy (PHD), and innumerable other doctors learned and skilled in a particular profession or field.

The opinion further departs from the long established rules and principles in that it holds:

> "Drugless healers can not qualify as expert witnesses as to matters in the general realm of medicine and surgery * * * We are not here concerned with the testimony of a drugless healer as an expert in the field of drugless healing as permitted by law, but it is apparent that the field of drugless healing and medicine and surgery are not coextensive, and we are here concerned with the field in medicine and surgery that lies outside of the drugless healing field."

It is, therefore, obvious that the rules established by the case of *Brooks v. Herd, supra,* are entirely disregarded and the new rule established by the decision is to the effect that drugless healers may not testify as experts in their own fields. The opinion further establishes a new and radical rule to the effect that the question of whether or not the treatment in a particular case was correct must be determined by the testimony of expert witnesses from the medical school, "*who alone are qualified to speak.*"

The supreme court has by its opinion, which in effect is judicial legislation, deprived the drugless and naturopathic physicians of the right to follow the practices and tenets of their own school of healing if there is a possible remedy in the field of medicine

or surgery, and by such legislation has deprived them of due process of law or of any protection under the law if they practice or adopt methods dissimilar to the medical field.

As stated in 12 *Am. Jur.* 309 (Const. Law #616, "due process of law protects against arbitrary action. Arbitrary action by a tribunal in the hearing of a cause or in its order violates due process," citing:

> *Washington ex rel Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

It is the petitioner's position that where on appeal the Supreme Court of Washington has arbitrarily established rules of law governing the relations of drugless healers and their patients contrary to the established rules, there has been such a departure from the settled law this court should consider and give effect to the law as it now exists following such declaration. As said in 54 *Am. Jur.* 898 (U. S. Courts #261):

> "Although it is generally the province of the Supreme Court on certiorari to inquire whether the judgment of the court below is correct on the record and in the light of the law and facts existing at the time the judgment was rendered, yet the court has power not only to correct errors in

the judgment under review, *but to make such disposition of the case as justice requires, and to that end it is bound to consider and give effect to any change,* either in law or in fact which has supervened since the judgment was entered, and, *if necessary set aside the judgment if it is in violation of that fact or law."*

Ashcraft v. Tennessee, 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921;

State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605;

Patterson v. Alabama, 294 U. S. 600, 79 L. Ed. 1082, 5 S. Ct. 575;

Huddleston v. Dwyer, 322 U. S. - L. Ed. 1246, 64 S. Ct. 1015.

CONCLUSION

The petitioners believe that from the record in this case it appears that the rights guaranteed under the Fourteenth Amendment to the Federal constitution have been denied them, and they have been denied not only due process of law and equal protection of the law, but that the arbitrary action of the Supreme Court of the state of Washington in establishing radically different rules and principles governing the trial of cases of the nature under consider-

ation, without affording petitioners an opportunity to meet such rules and principles, can and should be reviewed by this court and by the disposition of this case the court should see that petitioners are granted the rights which have been denied them.

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